The Association of American Railroads (“AAR”) and the American Short Line and Regional Railroad Association (“ASLRRA”), on behalf of themselves and their member railroads, submit the following comments in response to the Federal Railroad Administration’s notice of proposed rulemaking to revise its regulation governing Track Safety Standards (“TSS”) at 49 C.F.R. Part 213.1 AAR and ASLRRA (“the Railroads”) generally support the NPRM proposals and the incorporation of the Railroad Safety Advisory Committee’s TSS Working Group’s work. In particular, the Railroads support the proposed codification of longstanding railroad industry waivers that have proven to provide for the safety of railroad operations. FRA’s proposals to codify the use of continuous rail testing to satisfy part 213 track inspection requirements illustrate regulatory flexibility, allowing for the expanded use of technology to

1 AAR is a trade association whose membership includes freight railroads that operate 83% of the line-haul mileage, employ 95% of the workers, and account for 97% of the freight revenues of all railroads in the United States; and passenger railroads that operate intercity passenger trains and provide commuter rail service. ASLRRA is a non-profit trade association representing the interests of approximately 600 short line and regional railroad members and railroad supply company members in legislative and regulatory matters. Short lines operate 47,500 miles of track in 49 states, or approximately 29% of the national railroad network, touching in origination or termination one out of every five cars moving on the national railroad system, serving customers who otherwise would be cut off from the national railroad network. 84 Fed. Reg. 75,526 (Dec. 31, 2019).
enhance railroad safety for both Class I and smaller railroads. The Railroads’ comments on specific aspects of the NPRM follow below.

I. Time Periods to Conduct Field Verification Under § 213.240(e)

Under proposed § 213.240, FRA has offered alternate time periods during which railroads would be allowed to conduct field verification of defects noted during continuous rail testing. For “priority one” defects noted during testing, § 213.240(e)(2) would require field verification within 24 hours of the completion of the test run, or, in the alternative, within 36 hours of the detection of a particular suspect location, whichever is earlier.\(^2\) Similarly, for lesser priority defects, § 213.240(e)(1) would require field verifications within alternate time periods of 72 and 84 hours, respectively.\(^3\)

Providing for alternate time periods for compliance under § 213.240(e)(1)-(2) presents tracking issues that would be difficult and burdensome for railroads to monitor and would introduce unnecessary confusion regarding whether the appropriate time permitted for field verification was met. FRA should adopt a single standard allowing for 84 hours to conduct field verifications under paragraph (e)(1), and 36 hours for defects identified under paragraph (e)(2). The clock to calculate those respective time periods should start at the conclusion of the continuous test run, rather than piecemeal attempting to determine whether a suspect location identified during a test was verified within a moving 36- or 84-hour window depending on the time of its detection.

This approach will provide a simpler method for both railroads and FRA inspectors to determine whether required field verifications have been made within specified time periods. All

\(^2\) 84 Fed. Reg. at 72539.
\(^3\) Id.
field verifications will have been completed within the 36- and 84-hour deadline, which will be concretely established at the conclusion of a test run. FRA has previously permitted these respective 36- and 84-hour timeframes in granting continuous test waivers, and choosing to utilize the time of completion of the test run to calculate when all field verifications must be completed would encourage industry use of the continuous rail test process, the result of which is greater frequency of rail testing, leading to improved track safety. FRA indicated such in the NPRM’s preamble, stating that consistent with the agency’s desire to improve rail safety, extending the verification timelines would encourage more frequent use of rail testing. The Railroads strongly encourage FRA to adopt the approach discussed above, to provide for a straightforward time determination to make safety verifications and determine regulatory compliance.

II. § 213.240(c); Designation Time Requirement and Reason for Test Change

Under the new continuous rail testing provision at § 213.240(c), FRA proposes to require track owners intending to conduct a continuous test to, at least ten days prior to that test, “designate and record whether the test is being conducted to satisfy the requirements for an internal rail inspection under § 213.237, or § 213.339 if applicable.” This proposed ten-day advance designation requirement may actually detract from safety by preventing a continuous test run from occurring when an opportunity to conduct such testing arises within the ten-day window. FRA’s rationale for including this proposal is “so that FRA can conduct oversight and

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4 See, e.g., Docket No.’s FRA 2015-0130 and FRA 2018-0022; available online at www.regulations.gov.
5 84 Fed. Reg. at 72529.
6 Id. at 72550. The Railroads note FRA’s preamble discussion of this requirements states § 213.240(b)(1) is implicated, but the rule text incorporating this proposal is found in proposed § 213.240(c).
ensure the proper procedures are being followed.” However, FRA has not proposed that the agency affirmatively be notified before a track owner conducts continuous test runs, nor has that been the practice required under recent continuous test waivers, which the NPRM explains have proven to provide for safety. Further, information addressing whether a test run was used to satisfy §§ 213.237 or 213.339 will be recorded by the track owner, and that information is available to FRA upon request. This proposed artificial ten-day advance designation requirement serves no articulated safety purpose, and such a requirement could, in some instances, actually inhibit safety.

Also in paragraph (c), FRA has proposed that if the type of test changes following the commencement of a continuous rail test, the “change must be documented and include the time the test was started and when it was changed, the milepost where the test was changed, and the reason for the change.” The Railroads concur with this proposal except for the requirement to record a reason for the test change. The type of test conducted and the location where a change occurred will already be recorded and available to FRA. Under both the existing TSS and the NPRM proposals, no track owner is under any obligation to conduct continuous test runs in accordance with new § 213.240 to fulfill part 213’s existing inspection requirements and the reason a track owner may decide to change a test may be a result of a business decision not within FRA’s regulatory purview, and is not relevant to the owner’s obligation to fulfill part 213’s inspection requirements in any event. This proposal appears to serve no required safety purpose and should be deleted.

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7 84 Fed. Reg. at 72537.

8 Id. at 72550.
III. “Reasonable Notice” to Produce Records

NPRM proposals for §§ 213.7(f), 213.137(e)(2), 213.143, 213.240(c), 213.241(g) & (i), 213.305(f), and 213.369(e) & (g) include provisions requiring railroads to make track inspection records available to FRA upon “reasonable notice”. The Railroads appreciate FRA’s preamble explanation that “reasonable notice” would depend on the facts of a particular situation, including the scope of FRA’s request. However, what constitutes “reasonable notice” is inherently subjective. As such, in the absence of criteria establishing what constitutes “reasonable notice,” a railroad acting in good faith to provide requested records to FRA representatives upon “reasonable notice” should never be subject to civil penalties. One alternative is the adoption of a presumptive ten days’ notice requirement as found in the existing TSS, at §§ 213.241 and 213.369.

IV. Data Collection & Timelines for Tests Conducted Outside TSS Requirements

Proposed § 213.240 makes clear that continuous rail testing conducted in accordance with that section could be utilized to fulfill the track inspection requirements in §§ 213.237 or 213.339. However, FRA engaged in preamble discussion explaining that track owners are permitted to “conduct continuous rail tests above and beyond the minimum requirements of § 213.237, or § 213.339 where applicable. Those additional rail tests (that are not intended to meet the minimum number required by § 213.237, or § 213.339 where applicable), are not required to meet the requirements of proposed § 213.240 . . .”9 The Railroads understand this to mean that when track owners proactively choose to conduct additional continuous rail tests that are not intended to fulfill the Federally required TSS inspection requirements, that associated TSS testing intervals and deadlines, and data collection and other administrative requirements do not

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9 84 Fed. Reg. at 72537.
apply to the conduct of those tests. We request FRA clarify this point in the final rule. Consistent with the preamble’s discussion, track owners that choose to conduct additional rail testing outside of what is federally required should not be penalized for not abiding by administrative requirements that do not apply to those tests.

V. Training and Qualification References

Various NPRM proposals would incorporate training- and qualification-related requirements into part 213. The Railroads strongly agree that persons performing the safety-related duties contemplated in those sections must be competent to perform those functions safely. Section 401(a) of the Rail Safety Improvement Act of 2008, Public Law 110–432, 122 Stat. 4883, (Oct. 16, 2008) (“RSIA”), codified at 49 U.S.C. § 20162, required that FRA adopt minimum training standards for each category of safety-related employee. Employees charged with conducting railroad track inspection, repair, and maintenance duties are considered safety-related employees under RSIA. Section 20162(a)(1) specifically requires that railroads and contractors “qualify or otherwise document the proficiency of such employees in each class and craft regarding their knowledge of, and ability to comply with, Federal railroad safety laws and regulations and railroad carrier rules and procedures promulgated to implement those Federal railroad safety laws and regulations.’’ This requirement obviously includes the railroad track inspection standards in part 213.

In 2014, FRA published a final rule addressing the mandate of § 20162, codified at 49 C.F.R. Part 243. Part 243 contains extensive training and qualification standards and refresher training and qualification for railroad engineering employees. In addition, the costs and benefits

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10 See, e.g., proposed §§ 213.137(e)(3), 213.143, 213.240(d)(2).

of training-related considerations for employees conducting track inspection, repair, and maintenance-related duties required by part 213 were accounted for in that rulemaking. RSIA, and FRA’s subsequent development of part 243, generally made obsolete the previous need to codify scattershot training provisions throughout the Federal railroad safety regulations. FRA should delete additional references to training and qualification in the final rule, as unnecessary and duplicative.

Further, FRA provides agency guidance on its website for Class II and Class III railroads developing required training programs. Among other guidance, FRA clarifies that Class II and Class III railroads (and their contractors) can train railroad employees on the relevant provisions of the CFR parts that apply to the tasks that the employees actually perform. No additional training provisions are necessary in part 213, as the requirements are thoroughly covered in part 243 and its related guidance.

VI. **Proposed § 213.240(g)(10) “Service Failures”**

The proposed recordkeeping requirements at § 213.240(g)(10) would require railroads conducting continuous rail testing under this section to track the total number of “service failures” on each track segment. However, “service failures” are not defined in the NPRM or in proposed § 213.240. FRA should clarify in the final rule that it intends “service failures” to have the meaning defined in existing § 213.237(j)(3).

VII. **Flange-Bearing Frog (“FBF”) and Heavy-Point Frog (“HPF”) Waiver Items**

FRA is proposing to incorporate longstanding industry waivers allowing for the use of FBF’s and HPF’s at §§ 213.137 and 213.143, respectively. The Railroads strongly support

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FRA’s proposal, as waivers allowing the use of these frogs have been in place for approximately 20 years. As FRA explained in the NPRM, there have been no accidents reported to FRA at or near locations of these FBF’s and HPF’s, and their use allows for safe railroad operations and has provided safety benefits.\textsuperscript{13} However, despite this exemplary safety record developed over twenty years, FRA has proposed that many of the same administrative and recordkeeping provisions found in the respective waivers addressing FBF’s and HPF’s should also be codified in §§ 213.137 and 213.143 (e.g., § 213.137(e)(2)-(3) and administrative items in footnote 3 to the table in § 213.143). Potentially burdensome administrative requirements that may be appropriate during a waiver period, when FRA is collecting information to allow it to evaluate a new technology to ensure safety, are no longer necessary or relevant once FRA has determined the new technology is safe and is authorizing its use. The Railroads encourage FRA to generally eliminate unnecessary administrative requirements addressing FBF’s and HPF’s in the final rule.

\section*{VIII. Performance-Based Criteria to Differentiate Defect Categories}

FRA requests comment on proposed § 213.240, regarding establishment of performance-based requirement to differentiate between categories of defects identified during continuous rail testing, and the appropriate field verification and remediation requirements for such defects. FRA also asked if certain types of defects should be exempted from field verification and remediation requirements in a final rule. As a general matter, the Railroads embrace performance-based requirements in place of prescriptive regulations that have the potential to quickly become outdated as railroad safety technology rapidly advances. However, in the absence of any specific proposal from FRA to comment on here, continued utilization of the table at § 213.133(c) and the current categorization of priority one, two, and three defects is

\textsuperscript{13} 84 Fed. Reg. at 72530-32.
acceptable. Also, establishing an entirely new defect categorization framework would have implications beyond proposed § 213.240, and would require a more thorough collaborative evaluation best handled by the RSAC’s TSS Working Group.

IX. “Visual” Track Inspections

FRA proposes to add the word “visual” in various locations in both heading and text in §§ 213.233 and 213.365, both for consistency and to clarify that those sections address visual track inspections. The Railroads appreciate FRA’s discussion and effort to provide consistency. However, as technology evolves in the future and is deployed by railroads in manners that will continue to enhance railroad safety, inspections to satisfy the requirements in part 213, including §§ 213.233 and 213.365, may not always be conducted “visually” by humans. Automated inspections may very well be used in combination with, or in lieu of, human “visual” inspections, as rail inspection technology continues to advance. The use of the word “visual” inspection without further clarification may distinguish it from use of machine vision, e.g., one relying on radar or acoustics, that may fulfill additional track inspection requirements in the future. We understand the text of existing §§ 213.233 and 213.365 currently contemplates human visual inspections are used to satisfy the requirements of those sections, but it is unnecessary to add language now to these sections that could make them more outdated in the future. If FRA adds language regarding “visual” inspections to this section, such language should account for the use of machine vision in the future.

X. Track Inspections for Tourist, Scenic, Historic and Excursion Operations

The Railroads support FRA’s addition of a footnote that adds regulatory flexibility to the table at 49 C.F.R. § 213.233(c). This proposed footnote would exempt, in two situations, entities from the required twice-weekly inspection requirement for track carrying passenger trains if the
passenger train service consists solely of tourist, scenic, historic or excursion operations as defined in 49 C.F.R. § 238.5. In the first situation, this exemption would apply where no passenger service is operated over the track during the inspection week. During the second, the exemption would apply where passenger service is operated during the inspection week but only on a weekend (including a three-day extended weekend) and an inspection is conducted not more than one day before the start of the weekend. This proposed change provides a common-sense approach for these types of operations, providing track safety while eliminating unnecessary, burdensome cost.

XI. High-Density Commuter Line Exemption

FRA is proposing to delete a provision at existing 49 C.F.R. § 213.233(b)(3) which exempts high-density commuter lines from certain track inspection requirements when track time does not permit on-track vehicle inspections and where track centers are less than 15 feet apart. FRA states the proposal is made in light of Sec. 1149 of the Fixing America’s Surface Transportation Act, Public Law 114-94, 129 Stat. 1686 (Dec. 4, 2015) (FAST Act) and National Transportation Safety Board (NTSB) Safety Recommendation R-14-11. The FAST Act requires FRA to evaluate the issue of whether such high-density lines commuter lines should be inspected in the same manner as other commuter lines. The NPRM states that during TSS Working Group discussions it was agreed no railroads currently utilize the high-density commuter line exemption and proposed to delete that existing provision.

Since the conclusion of RSAC discussions and publication of the NPRM, industry has studied this issue further and determined that the high-density commuter line exemption is still in

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use. Amtrak utilizes the exception in the area of Penn Station in New York City, and in the Washington, D.C. and Boston terminals. Certain commuter railroads also indicate they still utilize the exemption. Amtrak is concerned that elimination of the exemption would result in roadway workers being required to conduct additional inspections at high traffic volume locations with narrow track centers. This concern is consistent with those conveyed by FRA to NTSB in the agency’s November 14, 2014, response to Safety Recommendation R-14-11, where FRA explained the exemption “is to mitigate risks posed to track inspectors when they are attempting to access tracks with a high traffic density.” Further, Amtrak also has concern regarding the impacts to passenger train service when considering additional track inspections would be required. Alternately, if some such additional track inspections were to occur at off-peak passenger hours at night so as not to disrupt passenger train traffic, visibility to thoroughly inspect track is much more limited. FRA should delete this proposal until this issue can be evaluated more fully under the FAST Act, and so competing roadway worker safety and passenger service concerns can be appropriately reconciled.

Respectfully Submitted,

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15 Id.